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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

No. 693

UNITED STATES OF AMERICA,

Petitioner,

vs.

JAMES A. MACK and CONCORD CASUALTY AND SURETY COMPANY.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The Petition For The Writ Ought Be Denied.

I.

The repeal of the 18th Amendment and the adoption of the 21st Amendment without a saving clause respecting any of the provisions of the enforcement acts, to wit: The National Prohibition Act, extinguishes all claims of forfeitures, penalties or damages which may have arisen by the breach of such statutes, prior to their repeal and upon which final adjudication has not been made.

U. S. v. *Chambers et al.*, 291 U. S. 217, 54 Sec. 434, 78 L. Ed. 763;
Matoil Service & Transportation Co. v. *U. S.*, 72 Fed. (2nd) 772;
Certiorari denied.

II.

The rights of the Government on the bond in question were no greater than its right of forfeiture of the vessel if the vessel were in possession of the Government at the time suit was instituted on the bond. Forfeiture of the vessel contemplated the sovereign's continued power to confiscate. The action on the bond could be resisted by a showing of good cause why the vessel should not be forfeited. This right was saved to the claimant as owner of the property under the specific provisions of Section 26 of the National Prohibition Act. Under the bond in question, the Government could suffer no greater damage than the tainted interest of the owner of the vehicle and if bona fide lienors intervened, their rights would be superior to the Government's. In short, the measure of the penalty to be inflicted against the vessel or vehicle for which the bond is given under Section 26 is measured by the provisions of Section 26 without which statute the relative rights of the government and the claimant cannot be determined. *U. S.* v. *Warnell,* 67 F. (2) 831. Except for the 18th Amendment, the bond would not have been given.

III

All penalties and forfeitures incurred by reason of the existence of the National Prohibition Act were, in effect, remitted by the repeal of the 18th Amendment and adoption of the 21st Amendment without a saving clause.

Chief Justice TANEY, observed in

> *Maryland Use of Washington County* v. *Baltimore & Ohio R. R. Co.,* 3 How. 534, 552, 11 L. Ed. 714, 722:
>
> "The repeal of the law imposing the penalty is of itself a remission."

In the *Chambers* case, *supra,* Chief Justice HUGHES quoted the above language with approval.

IV.

The bond in question is a statutory bond dependent entirely upon the continued validity of Section 26 of the National Prohibition Act.

U. S. C. Title 27, Section 40.

V.

The collection on the bond in question may be resisted only by defenses which are available by reason of the statutory provisions of Section 26, without which statute defenses are lost and unavailable. It is error to suppose that the bond in question is a contractual obligation independent of the National Prohibition Act. Not alone are its terms commanded by the provisions of Section 26, but it is only by virtue of that statute that the bond itself might be exacted. Only by virtue of Section 26 may the owner of the property re-possess himself by giving a bond in accordance with the terms of that statute so that he might hold the property *pendente lite.* Whether that bond will become forfeited or not depends upon the facts and circumstances under which the property for which the bond had been given had been seized and upon the interest of the claimant and whether he can show good cause to have the same restored to him. These rights are preserved by the statute which gives the bond validity. Any attempt to divorce these proceedings from the National Prohibition Act and more particularly, from the forfeiture provisions of Section 26, seems in vain.

As stated by the Circuit Court of Appeals (Record 28):

> "On the other hand, it may be that the bond is collectible, though the obligee must restore the proceeds if the prosecution fails. That would even more clearly betray the confiscation which lurks behind, for it would be absurd to collect the proceeds after all power to keep them disappears. Less nicely

considered, it is apparent that, since the bond was a mere substitute for the arrested boat, the position of the Treasury ought not to be amended by the substitution; that the purpose in allowing the owner to secure immediate possession of his property, must be read as subjecting him to no more onerous conditions than if he had left it under arrest. Whether it be vehicle or bond, a sovereign's sounds in contract, that a bond is a 'chose in action,' cannot disguise the fundamental character of what is done.

In accord is the ancient rule that until the bail is 'fixed,' he will be exonerated by anything which would discharge the principal from imprisonment were he surrendered; a fortiori by anything which would excuse his surrender.

Beers v. *Haughton,* 9 Pet. 329, 358, 9 L. Ed. 145; *Kelly* v. *Henderson,* 1 Pa. 495."

VI.

The petitioner relies upon certain additional authorities not pressed in the Court below. In none of these cases was the question of the fact of the repeal of the 18th Amendment urged or considered. However, the importance of the provisions of the bond as effected by Section 26 is evidenced throughout the opinion in

U. S. v. *Warnell,* 67 Fed. 2nd, 831.

In *U. S.* v. *Barth,* 279 U. S. 370, a case not even remotely touching the question in the case at Bar, this Court stated:

"The object of the bond was not only to prevent the immediate collection of the tax, but also to prevent the running of time against the Government."

Gulf States Steel Co. v. *U. S.,* 287, U. S. 282, likewise has no application, for there too, this Court stated that the bond was given for the express purpose among other things, to delay the collection of the tax and therefore, it was held, that the statute of limitations could not bar the right of the

Government. The statute of limitations is not involved in the case at Bar. However, the distinction between the statute of limitations being invoked as a shield, and the loss of jurisdiction, right, and power by virtue of the repeal of a statute is too evident to require discussion. Furthermore, the delay in the case at Bar was wholly occasioned by the Government's own inaction. There never was a forfeiture decree in any libel proceedings against the vessel, nor was any order of forfeiture decreed in the criminal cause after the plea of guilty of possession in transportation was entered. The action was brought on the bond almost two and one-half years after the termination of the criminal proceedings and as the District Court observed,

> "There was nothing impetuous about that."

The learned Circuit Court of Appeals in its opinion distinguished the authorities relied upon by the Government and concludes:

> "When we said that it was intended as a substitute for the 'damage' or 'loss' of the United States, we spoke of the loss incurred by failing to collect the penalty not of any loss involved in the sale or traffic in liquors. There was no such 'loss'; forfeiture is a punishment."

Wherefore, it is respectfully prayed that the petition for a writ of certiorari be denied.

Respectfully submitted,

LOUIS HALLE,
Attorney for Respondent.

MILTON R. KROOPF,
on the Brief.